Supreme Court, U.S.
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IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

FLORENCE KENYON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD J. KENYON, SR.,

Respondent.

On Petition for a Writ of Certiorari to the Florida Second District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state law permitting a jury to impose liability on tobacco companies for the mere manufacture and sale of cigarettes, without more, conflicts with and is preempted by congressional policy allowing the production and sale of cigarettes in the United States.

PARTIES TO THE PROCEEDING

Petitioner is R.J. Reynolds Tobacco Company. R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., formerly known as RJR Nabisco, Inc. On December 11, 2000, R.J. Reynolds Tobacco Holdings, Inc. acquired Nabisco Group Holdings Corp, now a wholly-owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., renamed RJR Acquisition Corp. Since June 15, 1999, R.J. Reynolds Tobacco Holdings, Inc. has been a publicly-owned corporation. Before then, RJR Nabisco, Inc. was a wholly owned subsidiary of RJR Nabisco Holdings Corp., a publicly owned corporation. RJR Nabisco Holdings Corp. is now Nabisco Group Holdings Corp., and since June 14, 1999, has *not* held a direct or indirect ownership interest in R.J. Reynolds Tobacco Holdings, Inc. or R.J. Reynolds Tobacco Company.

Fidelity Management & Research and Capital Research and Management each own more than 10 percent of the publicly traded stock of R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. recently announced that it is seeking a potential corporate transaction with another tobacco holdings company. A copy of its press release is included as part of the appendix to this petition. *See* Pet. App. 63a-69a.

Respondent is Florence Kenyon acting individually and as a representative of the estate of Floyd J. Kenyon, Sr.

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OPINIONS BELOW

The Florida Second District Court of Appeal's *per curiam* order (Pet. App. 2a) was issued without opinion and is unreported. The Florida Circuit Court for the Thirteenth Judicial Circuit's decision (*id.* at 3a-4a, 17a, 25a) was also issued without opinion and is unreported.

JURISDICTION

On May 30, 2003, the Florida Second District Court of Appeal issued a one-word *per curiam* order—"Affirmed"—rejecting petitioner's preemption argument. Pet. App. 2a. It subsequently denied a timely filed petition for rehearing, rehearing *en banc*, and issuance of a written opinion on August 8, 2003. *Id.* at 1a. Because the Florida Supreme Court does not have jurisdiction under the Florida Constitution to review *per curiam* orders of the District Court of Appeal rendered without opinion, *see Jenkins v. Florida*, 385 So. 2d 1356, 1359 (Fla. 1980) (recognizing limitation on Florida Supreme Court's jurisdiction), the intermediate appellate court is the highest state court in which judgment could have been had. *See Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970) (reviewing Florida District Court of Appeal decision on this ground); Stern & Gressman, SUPREME COURT PRACTICE 166 & n.48 (8th ed. 2002). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

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[1] On September 5, 2003, Reynolds filed a petition with the Florida Supreme Court under the court's all writs jurisdiction seeking an order to compel the Florida Second District Court of Appeal to publish a written opinion explaining its reasons for decision. This motion seeks extraordinary relief and does not alter the fact that the judgment below is final and unreviewable as a matter of state law and a final disposition by the highest Florida court within the meaning of 28 U.S.C. §1257(a). Reynolds will advise the Court of the Florida Supreme Court's decision on this petition when one is issued.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATEMENT

This case involves the Florida courts' blatant disregard of this Court's precedent on a recurring federal question of tremendous importance. In the proceedings below, the Florida Circuit Court for the Thirteenth Judicial Circuit and the Second District Court of Appeal, without any explanation whatsoever, permitted cigarette manufacturers to be held liable under state tort law for merely manufacturing cigarettes, because cigarettes are supposedly inherently dangerous. As this Court has made clear, however, the manufacture of cigarettes cannot be rendered unlawful or banned as a matter of federal policy. Accordingly, to the extent Florida law forces a cigarette manufacturer to cease cigarette production or face potential tort liability, it conflicts with a federal objective and is preempted.

1. For nearly forty years, Congress has extensively regulated tobacco products, enacting six separate pieces of legislation to address tobacco use and human health since 1965. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200; Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L.

No. 99-252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394.

Despite its comprehensive regulation of tobacco products, Congress has never ordered a ban of cigarette manufacturing or sought to prohibit the sale of tobacco products in the United States. To the contrary, Congress has provided in the United States Code that "[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." 7 U.S.C. § 1311(a). Other sections of the Code expressly recognize Congress's decision to protect both public health and "commerce and the national economy" by requiring that cigarette manufacturers "adequately infor[m] [consumers] about any adverse health effects" from tobacco use in lieu of prohibiting the sale of tobacco products. 15 U.S.C. § 1331.

In light of Congress's long-standing decision to regulate tobacco products instead of banning them and its decision to protect "commerce and the national economy . . . to the maximum extent" in connection with tobacco regulation, this Court has concluded that "Congress . . . has foreclosed the removal of tobacco products from the market." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000). "A ban of tobacco products . . . would therefore plainly contradict congressional policy." *Id.* at 138-39.

2. Petitioner R.J. Reynolds Tobacco Company ("Reynolds") is the second-largest tobacco manufacturer in the United States and produces the Winston, Camel, Salem, and Doral cigarette brands. Respondent is Florence Kenyon, acting individually and on behalf of the estate of Floyd J. Kenyon, Sr. ("Kenyon"). Kenyon began smoking in 1942. Until the early 1970s, Kenyon smoked Camel cigarettes, but at that time he switched to Salem cigarettes. In 1982, Kenyon largely quit smoking, and in 1992, he quit smoking

altogether. Kenyon was diagnosed with lung cancer in April 2000, and just recently died.

3. In July 2000, Kenyon and his wife, Florence Kenyon, filed this action against Reynolds, alleging that Kenyon had contracted lung cancer as a result of smoking Reynolds' cigarettes. Kenyon sought actual and punitive damages for negligence and strict liability, and Mrs. Kenyon sought damages for loss of consortium. Kenyon's negligence and strict liability claims were both premised on two theories of recovery—Reynolds' failure to warn him of the health risks of smoking, and Reynolds' defective design of its cigarettes.

On October 5, 2001, Reynolds moved for partial summary judgment on preemption grounds. With respect to the failure to warn claims, Reynolds argued that the Federal Cigarette Labeling and Advertising Act ("FCLAA") expressly preempted Kenyon's claims based on conduct that occurred after 1969. In addition, Reynolds argued that the doctrine of conflict preemption precluded the design defect claims to the extent they were based *solely* on Reynolds' manufacture and sale of cigarettes, without more.

On October 25, 2001, the Florida Circuit Court for the Thirteenth Judicial Circuit granted the motion for partial summary judgment with respect to Kenyon's post-1969 negligence and strict liability claims for failure to warn. Pet. App. 8a-9a. On Reynolds' conflict preemption argument, however, the circuit court concluded that conflict preemption was not "a summary judgment issue as much as a burden issue that's more appropriately addressed in the jury instructions." *Id.* at 47a.

4. Accordingly, Reynolds submitted the following jury instruction to prevent the jury from finding for Kenyon on a preempted claim:

> I instruct you that Congress has determined that it is legal for Reynolds to manufacture, sell and advertise cigarettes

> notwithstanding the fact that cigarettes may be dangerous and addictive. Accordingly, I hereby instruct you as a matter of law that Reynolds cannot be held liable to the plaintiffs merely because it manufactured, sold, and advertised the cigarettes that Mr. Kenyon allegedly smoked.

Pet. App. 49a. Kenyon objected, arguing that the standard Florida jury instruction on negligence and strict liability was all Florida law required. *Id.* at 42a-44a.

The trial court, over Reynolds' objection (*id.* at 25a), rejected Reynolds' proposed instruction. Although the court did not publish any opinion on the issue, it explained at the charging conference that it felt compelled to adopt the Florida jury instructions that were used in *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), *cert. denied*, 533 U.S. 950 (2001), which the court believed implicitly suggested that cigarettes were legal products:

> I think that the way the instruction is currently crafted, articulating the standards under state law by its very nature recognizes the fact that products manufactured were manufactured legally by your [client]; and I see no other way to address that issue other than to give the instructions as they're written.
>
> So, I appreciate the argument. I appreciate it down the road, but I won't give that instruction. I'll leave the instruction as it is.

Pet. App. 28a-29a. The court's resulting erroneous instruction is reproduced in the appendix to this petition. *Id.* at 10a-12a.

Unsurprisingly in light of the court's summary judgment decision and instruction, Kenyon's counsel argued throughout the trial as if Reynolds could be held liable simply for manufacturing and selling cigarettes. For example, when cross-examining the only Reynolds'

employee to testify, Dr. David Townsend, Kenyon's counsel repeatedly elicited testimony to establish that no cigarette is safe:

> Q. You said cigarettes are risky, right?
>
> A. Many times.
>
> Q. In fact, I believe you testified there's no such thing as a safe cigarette?
>
> A. I didn't say that yesterday. I have said that many times, and not just in court.
>
> Q. And—so, Reynolds' position is, in fact, that there is no safe cigarette?
>
> A. Absolutely. There is no safe cigarette. What we've tried to do at Reynolds, however, is reduce the risk. But we'll be the first to tell you there is no safe cigarette—completely safe.

Pet. App. 37a-38a; *see also id.* at 34a (asking whether it was "true that Reynolds cannot demonstrate that the cigarette is safe for its intended use," and eliciting the response, "[i]n a general sense, that is a true statement."). Kenyon's counsel later asked whether a "cigarette is inherently dangerous," to which Dr. Townsend replied:

> That's exactly what I testified. There are inherent strong risks from any cigarette. No cigarette is safe. And furthermore there is no way if we develop a cigarette that completely eliminates the risks . . . there is no way to definitively prove . . . . that the cigarette would be completely safe. There is no safe cigarette.

Id.

During the cross-examination of Dr. Townsend, Kenyon's counsel further suggested that Reynolds had "chosen" liability by "choosing" to participate in the tobacco business:

> Q: And the products that Reynolds designs and manufactures are the choice of Reynolds, aren't they?
>
> A: I don't understand your question. What do you mean "choice"?
>
> Q: Well, doesn't Reynolds choose to make the products it does?
>
> A. We choose to make a number of products that we then put on the market. Ultimately, it's the consumer that makes the choice about whether they stay on the market.

Id. at 37a. And later during the cross-examination, counsel indicated that Reynolds could have avoided liability by manufacturing nicotine gum instead of cigarettes:

> Q. Does Reynolds make a pack of 20 pieces of gum that it sells for a couple of bucks?
>
> A. Of course not.

Id. at 34a-35a.

Playing on this theme that cigarettes are so inherently dangerous that Reynolds should never have manufactured them, Kenyon's counsel described his argument as follows: Kenyon "was injured by a defective product" that "shouldn't have been available to him in the form that they were in. Period." Pet. App. 26a. During closing, Kenyon's counsel told the jury to "think of two things that Dr. Townsend said: One, a cigarette is inherently dangerous; and two, it's not safe for its intended use. A cigarette is not safe for its intended use. If it's inherently dangerous and not fit for its intended use, it's unreasonably dangerous and defective." *Id.* at 21a. He further claimed that nicotine in cigarettes was addictive and "made people smoke," but Reynolds "didn't do anything about it because they wanted to stay in the conventional cigarette business as long as they could." *Id.* at 23a. Kenyon's counsel also took advantage of the erroneous instruction on strict liability to argue that cigarettes are,

without more, so inherently dangerous as to justify the imposition of tort liability:

> "A product may also be unreasonably dangerous if the risk of danger outweighs the benefit." Well, so, you have to say, "What's the benefit of a cigarette?" Most people tell you people don't smoke—don't ever tell you. What's the benefit of that? There isn't any. So the risk of danger would outweigh—it would simply outweigh whatever benefit you get from the cigarette.

Id. at 22a.

After the close of Kenyon's case, on November 21, 2001, Reynolds filed a motion for directed verdict and a new trial, arguing that Kenyon had submitted no evidence suggesting that an alternative cigarette design was available or that Kenyon would have chosen an alternative cigarette. Pet. App. 14a-15a. Rather, Kenyon relied on the preempted strict liability claim that Reynolds could be held liable simply for manufacturing and selling cigarettes. *Id.* The court denied this motion without opinion. *Id.* at 17a-19a.

5. On December 12, 2001, the jury rendered a verdict finding in Reynolds' favor on all claims *except* strict liability for defective cigarette design. Pet. App. 5a-7a With respect to strict liability, the jury awarded Kenyon $165,000 for his medical expenses. *Id.* at 7a. The court entered final judgment on December 18, 2001. *Id.* at 3a-4a.

6. Reynolds timely filed a notice of appeal on March 28, 2002, and asked for reversal, again on the ground that Kenyon's strict liability claim was conflict preempted. On May 30, 2003, the Florida Second District Court of Appeal affirmed the lower court's decision without opinion in a *per curiam* order. Pet. App. 2a. On August 8, 2003, the court denied Reynolds' motion for rehearing, rehearing *en banc*, and issuance of a written opinion. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

The Florida Second District Court of Appeal's decision affirmed the imposition of liability on a cigarette manufacturer for merely participating in the business of producing and selling cigarettes without more. If allowed to stand, this ruling will effectively force cigarette manufacturers to choose between exiting the tobacco-products business in Florida or facing potentially massive state tort liability. For this reason, the decision is an affront to Congress's determination that cigarettes cannot be prohibited as a matter of federal economic policy and flatly contradicts this Court's preemption and tobacco-regulation jurisprudence. In addition, the ruling is inconsistent with other state and federal decisions regarding conflict preemption.

This Court should correct, indeed should summarily reverse, the erroneous decision of the Florida Second District Court of Appeal. Absent this Court's intervention, the literally thousands of cases pending against cigarette manufacturers in Florida could be prosecuted as if mere participation in the cigarette business, without more, is tortious. This would create the possibility of a *de facto* ban on cigarette manufacturing and sales in the State of Florida.

I. THE FLORIDA SECOND DISTRICT COURT OF APPEAL'S DECISION CONFLICTS DIRECTLY WITH CONGRESSIONAL POLICY AND THIS COURT'S JURISPRUDENCE.

Contrary to the lower court's decision, this Court's cases compel the conclusion that cigarette manufacturers cannot be liable for the mere manufacture and sale of cigarettes, as such a result would conflict with federal policy and objectives.

Just three years ago, in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000),

this Court confirmed that Congress has so "foreclosed the removal of tobacco products from the market" that cigarette manufacturers must be allowed to sell their product. *Id.* at 137. In that case, the Food and Drug Administration ("FDA") asserted that it had the authority to regulate tobacco products. The Court resoundingly rejected this argument in part because FDA regulations would have required a ban of cigarette and smokeless tobacco sales, in contravention of Congress's determination that tobacco products must be allowed to remain on the market in the interest of the national economy. *Id.* at 137-38.

In the Court's view, Congress had clearly demonstrated its intent to permit the manufacture and sale of tobacco products by providing in the United States Code that "'[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.'" *Id.* at 137 (quoting 7 U.S.C. § 1311(a)). In addition, Congress's extensive regulation of tobacco products, at a time when the potential ill-effects of tobacco use were known, compelled the conclusion that Congress meant to keep the products on the market:

> When Congress enacted these statutes [regulating tobacco], the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. Nonetheless, Congress stopped well short of ordering a ban. Instead, it has generally regulated the labeling and advertisement of tobacco products, expressly providing that it is the policy of Congress that "commerce and the national economy may be . . . protected to the maximum extent consistent with" consumers "being adequately informed about any adverse health effects." 15 U.S.C. § 1331. ***Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy to the***

> *maximum extent" reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statues is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.*

Brown & Williamson, 529 U.S. at 138-39 (internal citations omitted) (emphasis added).

Only a few months after issuing its decision in *Brown & Williamson*, indeed in the same Term, this Court also concluded that States cannot undercut federal policy by imposing tort liability on a manufacturing practice that Congress has sanctioned in order to promote a national objective.

Specifically, in *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000), Alexis Geier, who was seriously injured after the Honda Accord she was driving collided with a tree, sued Honda under state tort law claiming that her injuries were the result of Honda's failure to include airbags or other passive restraint devices in the car. *Id.* at 865. The Court concluded that Geier's "'no airbag' lawsuit" was preempted because it "conflict[ed] with the objectives of [federal regulations]." *Id.* at 866.

If allowed to proceed, the Court explained, Geier's claim would have frustrated a federal regulatory scheme—namely, Department of Transportation regulations that permitted automobile manufacturers to install airbags, other passive restraints or manual restraint devices at their discretion. This federal policy embodied the "judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (quoting brief of United States) (emphasis in original). But Geier's tort action "depend[ed] upon its claim that manufacturers had a duty to install an airbag." *Id.* Geier's suit thereby "presented an

obstacle to the variety and mix of devices that the federal regulation sought," and was preempted.

Taken together, *Brown & Williamson* and *Geier* unambiguously demonstrate that any state law or rule that permits the imposition of liability simply for the manufacture and sale of cigarettes, without some specific defect in the particular cigarette at issue, is preempted. *Brown & Williamson* holds that, while tobacco products may be extensively regulated, their manufacture and sale *cannot* be prohibited in light of federal policy permitting cigarette production as necessary to the national economy. *Geier*, moreover, holds that state tort law is preempted and stands as an obstacle to the fulfillment of federal policy objectives when it imposes liability on a manufacturing practice that Congress has sanctioned. Thus, together, these decisions confirm that States cannot impose tort liability based simply on the manufacture and sale of cigarettes, because doing so would conflict with Congress's policy of allowing cigarette sales to promote economic stability.

Kenyon was permitted to recover, however, precisely under this rationale. Reynolds sought summary judgment, a directed verdict, and special jury instructions on the ground that Kenyon's strict liability claim—a claim based on Reynolds' participation in the cigarette industry—was preempted. But the circuit court refused to even consider this argument, rejecting it out of hand. Kenyon prosecuted his case as if the issue were whether cigarettes are so inherently dangerous that their manufacture and sale, without more, violates tort law. The jury responded by finding Reynolds liable on one claim only, this strict liability claim.

As a result, the trial court permitted Kenyon to recover on the basis of the jury's determination that cigarette manufacturers have a duty to refrain from manufacturing and selling cigarettes because cigarettes are inherently dangerous and defective. But this determination effectively requires cigarette manufacturers to stop making cigarettes or face

staggering liability. As such, the tort liability imposed below is an obstacle to the fulfillment of Congress's policy to regulate *but ultimately permit* the sale of tobacco products so that "commerce and the national economy may be . . . protected to the maximum extent." 15 U.S.C. § 1331; *Brown & Williamson*, 529 U.S. at 138-39.

Indeed, by affirming the jury's decision to impose liability for cigarette manufacturing and sales, the Florida Second District Court of Appeal's decision could effectively operate as a *de facto* ban on cigarette products. Under its approach, a manufacturer can be held liable, even if it adheres to every statute and regulation governing tobacco products and every other duty imposed by tort law, simply because it sold a lawful product, cigarettes. Only complete abstention from the manufacture and sale of this product would satisfy the lower court. As this Court has recognized, however, such a *de facto* ban "would . . . plainly contradict congressional policy." *Brown & Williamson*, 529 U.S. at 138-39.

Because the Florida Second District Court of Appeal did not provide reasons for its decision, it is difficult to discern why it failed to follow *Brown & Williamson* and *Geier*. Presumably, the lower court did not publish its views on the issue because it fully endorsed Kenyon's argument below. That is, the lower court surely would have written an opinion if it intended to adopt a novel reason for its decision—particularly one not addressed by the parties. Its failure to do so thus strongly suggests that the court was persuaded by Kenyon's argument. Kenyon's argument to the lower court, however, is flatly contrary to this Court's precedent.

In the Florida Second District Court of Appeal, Kenyon argued that there is no conflict preemption doctrine in tobacco cases, because all preemption issues in this area are governed by this Court's decision in *Cipollone*:

> The preemption doctrine does not concern cigarette design but relates to restrictions on their advertising and

> promotion. The controlling decision on the preemption of state law tort claims against cigarette manufacturers is *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("*Cipollone*"). *Cipollone* adopted a straightforward test for determining whether a particular state law tort claim was preempted by federal regulation of the tobacco industry.

Pet. App. 52a. Kenyon then characterized *Cipollone* as requiring only one preemption inquiry in tobacco cases—"whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* (quoting *Cipollone*, 505 U.S. at 523-24)). Kenyon's counsel urged the lower court to disregard conflict preemption principles, claiming that "any argument that Reynolds might make that these precedents are inapplicable because it is relying on 'conflict preemption' rather than express preemption has been expressly foreclosed by no less an authority than the United States Supreme Court—twice." Pet. App. 53a.

For support, Kenyon cited this Court's statement in *Cipollone* that "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue," the court need not "infer congressional intent to pre-empt state laws from the substantive provisions of the legislation," and also cited *Cipollone*'s statement that there is no "inherent conflict" between "preemption of state warning requirements and the continued viability of state-common law damage actions." Pet. App. 53a-54a (quoting *Cipollone*, 505 U.S. at 517, 518)). In addition, Kenyon's counsel cited *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995), for the proposition that this quoted language from *Cipollone* "amounted to a blanket holding that implied or conflict preemption could never exist when Congress had chosen to

include an express preemption clause in a statute." Pet. App. 54a.

Kenyon concluded: "In short, with respect to tobacco, the doctrine of conflict preemption may not be used to extend the preemption expressly provided by statute." *Id.* *See also id.* at 16a-17a (making same argument to the circuit court).

This argument is demonstrably wrong.[2] This Court considered in *Geier* the impact that express preemption clauses and savings clauses have on conflict preemption principles and concluded that the existence of an express preemption provision, and even a savings clause, does not preclude the application of conflict preemption principles:

> Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the

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[2] In other proceedings, Kenyon's counsel has argued that by denying *certoriari* in *Carter v Brown & Williamson Tobacco Co.*, 533 U.S. 950 (2001)—a case involving express preemption and the meaning of *Cipollone*—this Court held that only express preemption applies in tobacco cases. This argument is erroneous because *Carter* had nothing to say about conflict preemption at all, *see* 778 So. 2d 932 (Fla. 2000), the petitioner in *Carter* did not seek review of any conflict preemption issue, and the Court's decision to deny *certiorari* said nothing about the merits of the *Carter* decision whatsoever. *See Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of the petition for *certiorari*) ("Inasmuch, therefore, as all that a denial of a petition for a writ of *certiorari* means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.").

> presence of the very . . . requirements that federal law requires.

529 U.S. at 871. Tellingly, Kenyon's counsel never cited *Geier* in its discussion of conflict preemption. Nor did counsel explain why *Geier* should have no application in the tobacco context. It is inescapable, however, that the *Geier* decision completely eviscerates Kenyon's argument below and the lower court's implied rationale.

II. THE FLORIDA SECOND DISTRICT COURT OF APPEAL'S DECISION IS INCONSISTENT WITH THE DECISIONS OF EVERY OTHER COURT THAT HAS CONSIDERED THE PREEMPTION ISSUE.

By ignoring the holding in *Geier* that conflict preemption principles apply to claims that fall outside of an express preemption provision, and by upholding the imposition of tort liability on Reynolds solely for manufacturing a product that Congress permits to be manufactured, the lower court radically departed from the preemption principles adopted by every other court that has considered these issues to date.

As an initial matter, since *Geier* was decided, the federal courts of appeal and state courts of last resort have uniformly rejected the argument advanced by Kenyon's counsel and implicitly adopted by the Florida Second District Court of Appeal that an express preemption provision bars the application of conflict preemption principles. *See, e.g.*, *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670 (9th Cir. 2003) (recognizing that just because action was not expressly preempted "nevertheless does not entirely foreclose any possibility of implied preemption") (internal quotations and citation omitted); *Fisher v. Ford Motor Co.*, 224 F.3d 570, 573 (6th Cir. 2000) (interpreting *Geier* to mean that despite the existence of an express preemption provision, "ordinary preemption principles nevertheless can apply to bar a suit against a manufacturer"); *James v. Mazda*

Motor Corp., 222 F.3d 1323, 1326 (11th Cir. 2000) (holding that regardless of existence of express preemption provision and savings clause "courts should apply normal implied preemption principles to determine if a state common law action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotations and citation omitted); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 794 (10th Cir. 2000) ("The presence of an express preemption provision . . . does not, by itself, foreclose an implied preemption analysis."); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381 (7th Cir. 2000) (holding that even though "the Act's express preemption provision did not preempt the suit . . . ordinary preemption principles continue to apply to this area"); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 741 (Tex. 2001) (same).

Significantly, apart from the Florida Second District Court of Appeal, the lower courts have also uniformly held that States cannot impose tort liability on a product or practice that Congress has sanctioned. Even prior to *Geier*, the federal courts of appeal and state courts of last resort uniformly recognized that States could not impose a *de facto* ban on products, even dangerous ones, that Congress sanctions.

In the hazardous waste field, for example, federal and state courts uniformly recognize that States may regulate but cannot prohibit certain non-land-based methods of hazardous waste disposal, because Congress provided in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6902(a)(1), that federal policy encourages such disposal. *See Hermes Consol., Inc. v. People*, 849 P.2d 1302, 1311 (Wyo. 1993) ("[A]lthough [RCRA] allows states to adopt more stringent regulations, it does not authorize them to defeat safe federal solutions . . . . [or] to directly subvert RCRA and [EPA] decisions by outright bans on activities federal authorities considered safe.") (internal quotations

omitted); *Jacksonville v. Ark. Dep't of Pollution Control & Ecology*, 824 S.W.2d 840, 842 (Ark. 1992) (holding that RCRA preempted city ordinance because the local measure frustrated RCRA's "preference for treatment rather than land disposal of hazardous waste"); *ENSCO, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986) ("A county cannot . . . arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste."); *Rollins Envtl. Servs. of La. v. Iberville Parish Police Jury*, 371 So. 2d 1127, 1132 (La. 1979) (same).

Similarly, in the mining context, the courts have uniformly held that state laws prohibiting mining activities on public lands conflict with federal law and are preempted in light of Congress's policy of encouraging the free and open exploration of public lands for valuable mineral deposits. 30 U.S.C. § 22; *see also United States v. Coleman*, 390 U.S. 599, 602 (1968) (observing that intent of 30 U.S.C. § 22 is to reward and encourage the discovery of minerals on public lands); *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998) (local laws were preempted because they "completely frustrat[e] the accomplishment of . . . federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages.").

Since *Geier* was decided, the federal courts of appeals have made clear that this rule applies even when States seek not to ban a product or practice outright, but to impose tort liability on the federally-sanctioned product or practice. In *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1953 (2003), for example, the Eleventh Circuit held that automobile makers could not be liable under strict liability principles for manufacturing an allegedly dangerous pickup truck that had only a lap belt in its center seat. *Id.* at 1280-82. Citing *Geier*, the court

reasoned that the claim conflicted with federal standards expressly permitting such a lap belt design, and that "[i]f successful, [plaintiff's] suit would foreclose an option specifically permitted by [federal regulations]. Therefore, it conflicts with that federal law and is impliedly preempted." *Id.* at 1282. *See also James v. Mazda Motor Corp.*, 222 F.3d 1323 (11th Cir. 2000) (holding same with respect to claim that automobile's design was inherently dangerous because it contained manual lap belt).

Similarly, the Seventh Circuit, also relying on *Geier*, has recognized that state tort law cannot impose liability on a product that, as a matter of federal policy, must be permitted on the market. *See Hurley v. Motor Coach Indus. Inc.*, 222 F.3d 377 (7th Cir. 2000). In *Hurley*, the court of appeals concluded that a bus manufacturer could not be liable under state tort law for failing to include in a bus a knee bolster, a three-point seat belt, an airbag, and a steel cage around the driver's area. *Id.* at 380. As a matter of policy, federal regulators "with specific policy objectives in mind" had left "to bus manufacturers" decisions about how to install passenger protection systems. *Id.* at 382. Because *Geier* required the preemption of state tort law whenever it "would undermine [a] policy objective" of the Federal Government, *id.* at 382, state law could not impose liability for the design choice of a bus manufacturer that Congress had sanctioned. Thus, in the face of *Geier*, the federal circuit courts agree that state tort law is preempted when it would allow manufacturers to be held liable for creating a product or utilizing a manufacturing practice that Congress provides must be permitted in order to achieve some policy goal.

Applying these same principles, numerous lower courts have held that cigarette manufacturers cannot be subject to strict liability simply for producing and selling cigarettes. In *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220 (W.D. Wis. 2000), for example, the court dismissed the claim that "it is actionable negligence for defendants to continue to

manufacture and sell cigarettes once they realized the danger that cigarettes posed." *Id.* at 1224. Citing ***Brown & Williamson***, the court observed that "[a] holding to that effect would run afoul of the congressional policy that the sale of cigarettes is legal." *Id.* at 1223. And citing *Geier*, the court noted that "[i]f Congress gives express sanction to an activity, the [S]tates cannot declare that activity tortious." *Id.* at 1224. In addition, it rejected the argument that conflict preemption principles do not apply to tobacco claims:

> Plaintiffs are correct that there is no law or regulation that preempts their claim that it is actionable negligence for defendants to continue to manufacture and sell cigarettes once they realized the danger that cigarettes posed. What preempts their claim is Congress's considered decision that the sale of cigarettes is not only not illegal but part of a market the government supports. Just as it would have interfered with the federal government's policy on air bags to allow state tort actions against automobile manufacturers who relied on the safety standard to omit air bags from their vehicles, allowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress's policy in favor of keeping cigarettes on the market.

Id. at 1224-25 (internal citations omitted).

Similarly, in *Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109 (D.P.R. 2002), ***aff'd on other grounds***, No. 02-2688, 2003 WL 22434631 (1st Cir. Oct. 28, 2003), the court rejected the argument that cigarette manufacturers could be liable under tort law for the "inherent[ly dangerous] characteristics of tobacco and cigarettes." *Id.* at 117. Citing ***Brown & Williamson***, the court observed that "Congress has foreclosed the removal of tobacco products from the market." *Id.* at 118. And citing *Geier*, it recognized that tort actions could not "interfere with Congress's policy in favor of keeping cigarettes on the market." *Id.* (internal citations

and quotations omitted). Taken together, the court concluded, these cases compelled the conclusion that "[d]efendant Reynolds cannot be held liable under Puerto Rico law simply because it manufactures and sells cigarettes. Therefore, to the extent that Plaintiffs seek to impose tort liability against Defendant Reynolds merely for manufacturing and selling cigarettes, we find Plaintiffs' claims to be preempted." *Id.*; *see also DuJack v. Brown & Williamson Tobacco Corp.*, No. X07-00728225-S, slip op. at 4, 6-7 (Conn. Super. Ct. Nov. 13, 2001) (granting directed verdict on claim that cigarettes were defectively designed because they contain nicotine; courts cannot "impose liabilities . . . merely for engaging in [the] activity of smoking, selling and using cigarettes" because Congress has determined that these are legal activities) (attached hereto, Pet. App. 57a-62a). The Florida court's decision thus conflicts with the reasoning adopted by every federal court of appeal interpreting *Geier* and the decisions of federal and state courts considering the precise issue here.

III. THIS COURT'S IMMEDIATE REVIEW OF THE IMPORTANT QUESTION PRESENTED IS NECESSARY TO PROTECT FEDERAL POLICY AND SUPREME COURT PRECEDENT.

This Court's review is appropriate not only to correct an erroneous decision on an important federal question but to safeguard federal policy and this Court's jurisprudence.

There can be no real debate that the question presented raises issues of tremendous national importance. Congress recognizes tobacco manufacturing as "one of the greatest basic industries of the United States." 7 U.S.C. §1311(a). This Court, moreover, has observed that preemption issues concerning tobacco suits have "manifest importance." *Cippolone*, 505 U.S. at 509. Indeed, legal issues surrounding the tobacco industry are so important to the national economy and thousands of pending suits that this Court has not hesitated to review them even absent a split of authority

on the underlying legal question. *See generally Brown & Williamson*, 529 U.S. at 130 (considering tobacco regulation by FDA absent a split of authority on the issue).

Review is particularly appropriate here. Absent this Court's immediate intervention, the lower court's decision could seriously undercut federal policy by effectively causing a *de facto* ban on tobacco sales in the State of Florida. There are literally thousands of cases pending in Florida that raise the same preempted strict liability claim on which Kenyon prevailed, and of these, many are being prosecuted by the same attorneys here. A sizeable number of these cases, moreover, are pending in the circuit courts within the jurisdiction of the Florida Second District Court of Appeal.

No doubt emboldened by their victory in the lower court, Kenyon's attorneys will likely continue to argue, wrongly, that conflict preemption principles do not apply in tobacco cases. Indeed, *since this case was decided*, plaintiff's counsel has successfully argued this erroneous theory of preemption in another Florida trial against Reynolds, demonstrating that the Florida courts' erroneous view of preemption will persist absent this Court's intervention. *See Hall v. R.J. Reynolds Tobacco Co.*, No. 00-1061, slip op. at 1-2 (Fla. 13th Jud. Cir. Oct. 1, 2003). Given their potential liability for every cigarette sale in the State, cigarette manufacturers would face severe pressure to discontinue cigarette sales in Florida, raising the very threat to the national economy that Congress sought to avoid.

This Court's review is, indeed, essential in light of the lower court's attempt to shield its decision from the Florida Supreme Court and prevent a true split of authority from ever developing on the question presented. Under the Florida Constitution, the Florida Supreme Court has no jurisdiction to review *per curiam* decisions of the District Courts of Appeal when the appellate court does not issue an opinion. *See* Fla. Const. art 5, § 3(b)(3); *Jenkins v. Florida*,

385 So. 2d 1356, 1359 (Fla. 1980) ("[T]he Supreme Court of Florida lacks jurisdiction to review *per curiam* decisions of the several district courts of appeal of this [S]tate rendered without opinion."). As a result, absent intervention by this Court, the Florida courts can insulate decisions that are contrary to this Court's precedent, federal law, and the jurisprudence of every other court by refusing to issue an opinion.

That is precisely what occurred here. Even though Reynolds appealed the conflict preemption issue and demonstrated that Kenyon's claim was flatly contrary to federal policy, the Florida Second District Court of Appeal affirmed the circuit court in a one-word *per curiam* order. Pet. App. 2a. Moreover, it denied Reynolds' request for the issuance of an opinion so that the Florida Supreme Court could consider the issue. *Id.* at 1a. By doing so, the court effectively prevented the Florida Supreme Court from either correcting its error or issuing a decision that would have cleanly split with the federal courts of appeal about the meaning of *Geier* and conflict preemption. Thus, unless this Court intervenes, the Florida courts will be allowed to flout this Court's decisions and federal policy due to a procedural anomaly specific to the State. *See Florida v. Rodriguez*, 469 U.S. 1, 5 (1984) (reversing Florida District Court of Appeal after court issued one word order affirming superior court that prevented state high court review, where lower court's decision clearly misread and misapplied this Court's precedents).

The Florida court's decision is so clearly contrary to this Court's precedent that summarily disposing of this petition in Reynolds' favor would be appropriate. *See* Sup. Ct. R. 16.1. A summary reversal order is called for where "the lower court result is so clearly erroneous, particularly if there is controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Stern & Gressman, *supra*, at 315-16.

This Court has not hesitated to exercise its summary disposition power in cases involving egregious and demonstrable errors by lower courts.[3] Nor has the Court

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[3] In the past ten years, the Court has exercised its summary reversal power in over fifty cases. *See, e.g., Mitchell v. Esparza*, No. 02-1369, slip op. at 1 (Nov. 3, 2003); *Yarborough v. Gentry*, No. 02-1597, slip op. at 9-11 (Oct. 20, 2003); *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040-41; (2003); *City of Los Angeles v. David*, 123 S. Ct. 1895, 1896 (2003); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002); *Early v. Packer*, 537 U.S. 3, 4 (2002); *INS v. Ventura*, 537 U.S. 12, 14 (2002); *Stewart v. Smith*, 536 U.S. 856, 861 (2002); *United States v. Bass*, 536 U.S. 862, 864 (2002); *Kirk v. Louisiana*, 536 U.S. 635, 635-36 (2002); *Horn v. Banks*, 536 U.S. 266, 267 (2002); *Sao Paulo State of Federative Rep. of Braz. v. Am. Tobacco Co., Inc.*, 535 U.S. 229, 232-33 (2002); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505 (2001); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001); *Ohio v. Reiner*, 532 U.S. 17, 18 (2001); *Fiore v. White*, 531 U.S. 225, 228-29 (2001); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222-24 (2000); *Texas v. Lesage*, 528 U.S. 18, 22 (1999); *Flippo v. West Virginia*, 528 U.S. 11, 12 (1999); *Maryland v. Dyson*, 527 U.S. 465, 465 (1999); *Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter*, 526 U.S. 124, 127-29 (1999); *Stewart v. LaGrand*, 526 U.S. 115, 118-21 (1999); *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 250 (1999); *Calderon v. Coleman*, 525 U.S. 141, 145-47 (1998); *New Mexico, ex rel. Ortiz v. Reed*, 524 U.S. 151, 153-55 (1998); *Hetzel v. Prince William County, Virginia*, 523 U.S. 208, 211-12 (1998); *City of Monroe v. United States*, 522 U.S. 34, 35 (1997); *Pounders v. Watson*, 521 U.S. 982, 983 (1997); *Mazurek v. Armstrong*, 520 U.S. 968, 971-76 (1997); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997); *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997); *United States v. Watts*, 519 U.S. 148, 149 (1997); *Greene v. Georgia*, 519 U.S. 145, 145-47 (1996); *United States v. Jose*, 519 U.S. 54, 57-58 (1996); *Pennsylvania v. Labron*, 518 U.S. 938, 938 (1996); *Calderon v. Moore*, 518 U.S. 149, 150-51 (1996); *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475-76 (1996); *Wood v. Bartholomew*, 516 U.S. 1, 2 (1995); *Purkett v. Elem*, 514 U.S. 765, 769 (1995); *United States v. Robertson*, 514 U.S. 669, 671-72 (1995); *Goeke v. Branch*, 514 U.S. 115, 120-21 (1995); *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Stansbury v. California*, 511 U.S. 318, 325-27 (1994); *Burden v. Zant*, 510 U.S. 132, 133-34 (1994); *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147,

ever limited its exercise of summary disposition power to criminal cases, summarily disposing of cases where the underlying suit involves legal principles that affect civil, rather than criminal, liability. *See Alafabco*, 123 S. Ct. at 2040-41 (arbitration dispute); *Major League Baseball Players Ass'n*, 532 U.S. at 505 (arbitration); *Breeden*, 532 U.S. at 271 (employment discrimination); *Village of Willowbrook v. Olecho*, 528 U.S. 562, 565 (2000) (easement dispute); *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. at 127-28 (statutory interpretation).

In addition, summary disposition is not a device limited to reversing the federal courts of appeals, but is routinely applied by this Court to state court decisions where, as here, the state court disregarded Supreme Court precedent. *See Alafabco*, 123 S. Ct. at 2040-41 (summarily reversing decision of Alabama Supreme Court that misapplied Supreme Court jurisprudence interpreting the Federal Arbitration Act); *Bunkley v. Florida*, 123 S. Ct. 2020, 2023-24 (2003) (summarily vacating Florida Supreme Court decision as inconsistent with *Fiore v. White*, 531 U.S. 225 (2001)); *Kaupp v. Texas*, 123 S. Ct. 1843, 1847-48 (2003) (summarily vacating Texas intermediate court decision as contrary to Court's Fourth Amendment jurisprudence); *Kirk*, 536 U.S. at 636 (summarily reversing Louisiana intermediate court decision as inconsistent with *Payton v. New York*, 445 U.S. 573 (1980)).

149-51 (1993); *United States v. Padilla*, 508 U.S. 77, 81-82 (1993); *Delo v. Lashley*, 507 U.S. 272, 277-80 (1993); *United States v. Nachtigal*, 507 U.S. 1, 5-6 (1993); *Dobbs v. Zant*, 506 U.S. 357, 358-60 (1993).

Indeed, just days before this petition was filed, the Court summarily reversed a decision of the Sixth Circuit—the second summary reversal of the Term. *See Esparza*, No. 02-1369, slip op. at 1.

This is true even when the lower court is a state *intermediate* court that has failed to apply Supreme Court precedent. *See Kaupp*, 123 S. Ct. at 1847-48 (vacating decision of intermediate Texas court); *Kirk*, 536 U.S. at 636 (reversing decision of Louisiana intermediate court); *Dyson*, 527 U.S. at 466 (summarily reversing intermediate Maryland court); *Newsweek, Inc. v. Fla. Dep't Revenue*, 522 U.S. 442, 443-44 (1998) (summarily vacating decision of the Florida District Court of Appeal); *Rodriguez*, 469 U.S. at 5 (summarily reversing one-word order of Florida District Court of Appeal).

In light of the thousands of pending cases in Florida raising the issue here, the clear error of the Florida Second District Court of Appeal and the need to protect federal policy, this Court's review, as well as its summary disposition of this case, is essential.

CONCLUSION

The petition should be granted, and either the Florida Second District Court of Appeal's decision should be summarily reversed or the Court should hear argument on the question presented.

Respectfully submitted,

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